causing an interest not to be registered and thus fraudulently keeping the register clear".

The words appearing in the latter case and which read "causing an interest not to be registered and thus fraudulently keeping the register clear" merely illustrate the effect of fraud. From these two authorities, fraud must be actual. There must be dishonesty of some sort. Fraud may be established if the designed object of a transfer is to cheat a man of a known existing right; or where by a deliberate and dishonest act a person loses an existing right.

Considering the case as a whole in the light of the above authorities, the evidence, even the appellant's own, clearly shows that the appellant was not honest as to the true value of the Sibu land when he persuaded the respondent to exchange the lands. Further, even if his evidence purporting to show that the value of the Kuching land was $55,000.00 and not $115,000.00 as stated by the respondent can be accepted, the exchange was still not fair, just and reasonable, having regard to the accepted value of the Sibu land. (See *Earl of Aylesford* v. *Morris* (*supra*)).

There is no need for us to deal with other grounds of appeal as on the evidence we agree with the learned Judge that the appellant perpetrated fraud in the exchange of the land titles. The declaration must therefore stand.

The main appeal and appeal on counterclaim are dismissed with costs. Deposit to respondent to the account of taxed costs.

Order accordingly

Solicitors: *Thomas & Co.; Ee & Lim.*

DATUK ONG KEE HUI v. SINYIUM ANAK MUTIT

[F.C. (Lee Hun Hoe C.J. (Borneo), Salleh Abas F.J. and George Seah J.) May 10 & July 26, 1982]

[Kuching – Federal Court Civil Appeal No. 193 of 1981]

Contract – Contract between member of political party and the party – Undertaking to donate allowance paid as member of Dewan Rakyat to party – Agreement to resign from being member of Dewan Rakyat on resignation from party – Contract illegal as being contrary to public policy – Whether person concerned can sue for damages – Members of Parliament (Remuneration) Act, 1980 (Act 237) – Federal Constitution, arts. 51 & 59.

Constitutional Law – Undertaking by member of political party to vacate seat – Federal Constitution, arts. 51 & 59.

Political party – Membership – Contract requiring termination as member of Dewan Rakyat on resignation from political party – Illegal and contrary to public policy.

Tort – Malicious falsehood – Misrepresentation – Conspiracy – Volenti non fit injuria.

The respondent was a member of a political party and was nominated to stand for a parliamentary constituency His election expenses were borne by the party. The respondent signed a document undertaking to donate the allowance paid to him as a Member of the Dewan Rakyat to the party. He also agreed that in the event of his doing any act which was seen to be against the interests of the party he would forfeit his seat in the Dewan Rakyat and the party could then submit the letter of resignation, signed by him, to the Speaker of the Dewan Rakyat. The respondent was elected as a member and at first he kept to his undertaking and requested his Parliamentary remuneration to be paid to the party. The party in turn gave him a monthly sum of $300.00. Subsequently he asked the party to increase the allowance to $600.00 but receiving no reply, he resigned from the party. The party thereupon sent the letter of resignation to the Speaker. The result was that the respondent lost his seat in the Dewan Rakyat. He brought an action against the party claiming the refund of $8,024.70 being his parliamentary remuneration retained by the party and the payment of $41,325.80 being the amount of parliamentary remuneration which he would have received had it not been for the party's submission of the letter of resignation. The learned trial judge held that the undertakings were illegal, but held notwithstanding the illegality that the respondent was entitled to the refund of $8,024.70 and to the special damages of $41,325.80, subject to the deduction of $15,000.00 for the election expenses ([1982] 1 M.L.J. 36). The appellant appealed.

Held: (1) in whatever way the matter was looked at the respondent's claims must be dismissed. If the arrangements were not illegal and therefore valid, it goes without saying that what were done by the party and the appellant with regard to the remuneration and the resignation were fully authorised by the arrangement and no claim could arise therefrom, unless it could be shown that the appellant was in breach of the agreement, which was not the case here;

(2) if on the other hand the arrangement was illegal, as correctly found by the trial judge, the respondent should not be entitled to the claim also, because the court will not lend its aid to an illegal transaction. No attempt was made by the respondent to show that he had nothing to do with the arrangement or that he was an innocent party. The appellant as the defendant was allowed by law to rely on the illegality in order to reject the respondent's claim;

(3) the arrangement was not a fraud and neither were the facts constituting the alleged causes of action for malicious falsehood, fraudulent misrepresentation or conspiracy separable from those constituting the illegality. Nor were the acts of the appellant done otherwise than in pursuance of the arrangement so as to exclude the maxim *volenti non fit injuria;*

(4) even if the arrangement was held to be a friendly or gratuitous one still the respondent was not entitled to recovered any claim because of the maxim *volenti non fit injuria.*

Cases referred to:–

(1) *Wells* v. *Foster* (1841) 8 M & W. 149, 151; 151 E.R. 987.
(2) *Cooper* v. *Reilly* (1829) 2 Sim 560; 57 E.R. 897.
(3) *Amalgamated Society of Railway Servants* v. *Osborne* [1909] 1 Ch. 163; [1910] A.C. 87.
(4) *Thankamma* v. *Speaker of Travancore-Cochin Legislative Assembly* A.I.R. 1952 Trav. Cochin 166.
(5) *Raghavanandam* v. *Chitrarasu* A.I.R. 1973 Mad. 50
(6) *Waugh* v. *Morris* (1873) L.R. 8 Q.B. 202.
(7) *J.M. Allan (Merchandising) Ltd.* v. *Cloke & Anor.* [1963] 2 Q.B. 340.
(8) *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343; 98 E.R. 1120, 1121.
(9) *Shelley* v. *Paddock & Anor.* [1978] 2 W.L.R. 877.
(10) *Shelley* v. *Paddock & Anor.* [1980] 2 W.L.R. 647.
(11) *Miller* v. *Karlinski* (1945) 62 T.L.R. 85.
(12) *Alexander* v. *Rayson* [1936] 1 K.B. 169.
(13) *Bennett* v. *Tugwell* [1971] 2 Q.B. 267, 272.
(14) *Birch* v. *Thomas* [1972] 1 W.L.R. 294.

FEDERAL COURT.

C.T. Wong (*William Chan* with him) for the appellant.

T.O. Thomas for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): This is an appeal and a cross-appeal from the decison of Wan Mohamed, J. giving judgment in favour of the respondent for a sum of $34,350.50 to be paid by the appellant. The facts are as follows:

The respondent was a member of the Sarawak United People's Party (SUPP), a political party based in Sarawak and the appellant was and still is the President of the party.

In the 1969 General Elections the respondent was nominated by the party to stand for the parliamentary constituency of Bau-Lundu and was successfully returned to Parliament as the member for this constituency. His election expenses, amounting to $15,000.00 in all for which he signed a promissory note, was borne by the party. As a condition for the nomination pursuant to the practice of the party he signed two documents. The first document (PL 10(B)) is a letter dated April 5, 1969 addressed to the Chairman of the party in which he solemnly declared that he promised to perform a number of undertakings of which the relevant ones in so far as this appeal is concerned are as follows:

"4. Donate to the Party the allowance paid to me by the Dewan Raayat;

5. Render such service as I may be called upon to do by the Central Working Committee of the Party.

I further declare that in the event of my doing any act which, to the Central Working Committee, may seem to be against the interest of the Party, I will forfeit my seat in the Dewan Raayat and you may submit the letter of resignation which I append here to the Speaker."

The second document (PL 10(C)) is an undated letter of resignation signed by the respondent pursuant to the undertaking. The letter is addressed to the Speaker of the Dewan Raayat in the following words:–

"Sir,

I hereby tender my resignation from being a member of this House with immediate effect."

It would appear from these two documents therefore that the arrangement between the respondent and his party was that in the event of his being successfully elected, he would give all his parliamentary remuneration to the party and he would lose his seat in the Dewan Ra'ayat, should he do any act which in the opinion of the party was against its interest and further should this event occur the Chairman would be authorised to submit the respondent's letter of resignation to the Speaker of the Dewan Ra'ayat. It is in anticipation of such a situation that the second document (PL 10(C)) was prepared and signed by the respondent without the date of its signing being inserted as this was presumably intended to be inserted later when the occasion of its use would arise.

After the election he took the necessary steps to have his parliamentary remuneration paid to the party. Firstly, he wrote to the Clerk of the Dewan Ra'ayat notifying the latter to remit the remuneration direct to Kwong Lee Bank and secondly, he wrote to the bank requesting it to pay all his remuneration, when received from the Clerk of the Dewan Ra'ayat, into the account of the party. (See DF1 and DF2). Thus for twelve months beginning from July 11, 1970 and ending on July 31, 1971, the respondent's parliamentary remuneration was paid to and received by the party in full. However, during this period the respondent received for his upkeep a monthly sum of $300.00 from the party. The total amount of the respondent's remuneration retained by the party was $8,024.70. This was made up as follows:

Total remuneration received by the party	$11,624.70
Less amount paid by the party to the respondent	3,600.00
Amount retained by the party	$ 8,024.70

The respondent soon found that the $300.00 monthly allowance was insufficient to maintain him and his family. So he asked the party to increase the allowance to $600.00, and as there was no reply to this request the respondent wrote a letter dated July 13, 1971 addressed to the Secretary-General of the party resigning his membership from the party "forthwith". (See PL2 and PL3). The resignation appears to be motivated solely by his desire to have a full right to his remuneration.

The party, however, did not take the respondent's resignation kindly. It considered that it was an act against its interest and therefore the appellant as the Chairman of the party dated the respondent's letter of resignation (PL 10(C)) with "August 3,. 1971" as the date of signing and sent it to the Speaker of the Dewan Ra'ayat. Upon being notified that by virtue of PL 10(C) his resignation from the House had been accepted by the Speaker, the respondent made a strong protest to the Speaker regarding the latter's acceptance of his resignation. The respondent sent a telegram and subsequently a letter (PL 9 and PL 15). However, after a letter of explanation by the appellant dated August 14, 1971 (PL 10(A)) was received, the Speaker seemed satisfied and took no further action in the matter, nor did the respondent proceed further to challenge the Speaker's ruling. Thus he lost everything. Instead of getting his parliamentary remuneration in full, he lost not only the $300.00 monthly allowance paid by the party, but also his seat in the Dewan Ra'ayat.

On the May 17, 1973 he took out a writ against the appellant claiming:

(a) the refund of $8,024.70 of his parliamentary remuneration retained by the party;

(b) the payment of $41,325.80, being the amount of parliamentary remuneration which he would have received had it not been for the appellant's submission of the letter of resignation;

(c) reimbursement of $1,425.00, being legal fees which he incurred for obtaining legal opinion prior to the suit; and

(d) unliquidated damages for malicious falsehood, fraudulent misrepresentation and conspiracy in connection with the appellant's submission of the letter to the Speaker.

In his defence the appellant contended that the receipt and retention of the respondent's parliamentary remuneration and the dating and the submission of the letter of resignation were all done in pursuance of the respondent's undertakings given on April 5, 1969 contained in PL 10(B). The defence also denied that the appellant was guilty of malicious falsehood, fraudulent misrepresentation and conspiracy, as the dating and the submission of the letter, being in pursuance of the respondent's undertakings, did not and could not constitute any of the alleged wrongs.

In his reply the respondent averred that the undertakings he made on April 5, 1969, being gratuitous, were null and void and being contrary to public policy, were also illegal.

The learned trial judge agreed that the undertakings were illegal, but held that notwithstanding illegality, the respondent was entitled to the refund of $8,024.70 and to the special damages of $41,325.80 subject, however, to the aggregate being reduced by $15,000.00 being the sum the party spent on election expenses for the respondent and for which he signed a promissory note. The resulting figure awarded is therefore $34,350.50. He dismissed the claim for unliquidated damages as none of the alleged torts was proved and he also dismissed the claim for reimbursement of legal fees.

The Issues:

Counsel for the respondent submitted that the arrangement was illegal but despite illegality the respondent was entitled to all the claims he made, not only in respect of the retention of the remuneration but also for the damages, special and general.

On the other hand counsel for the appellant submitted that the arrangement was legal and that therefore the respondent was not entitled to any of the claims and that alternatively even if the arrangement was illegal, there were no grounds upon which the respondent would be entitled to any claim at all. He therefore urged us to allow the appellant's appeal and to dismiss the respondent's cross-appeal.

Thus in this case the issues raised are three.

The first is whether the arrangement was illegal and the second is, if it is so, what sort of consequences would follow from it, whilst the third is whether in spite of the illegality the respondent is entitled to the judgment.

We now proceed to deal with these issues.

(1) *The first issue – illegality or not*:

There can be no doubt that the arrangement was contractual and in substance it amounts to this – i.e. in consideration of the party adopting him as a party candidate and bearing all expenses for his election, the respondent promised that in the event of his being successfully elected he would do a number of acts, but the relevant ones for the purpose of this case are only the following two acts, namely: (a) to give all his parliamentary remuneration to the party; and (b) to forfeit his seat in the Dewan Ra'ayat should he do any act which would be contrary to the interest of the party. Let us now examine these undertakings one by one.

(a) *Donation of parliamentary remuneration:*

"To donate" is too polite a word to describe the reality of this case when the fact is that the respondent was compelled under this undertaking to hand over all his parliamentary remuneration to the party, and that the $300.00 monthly allowance paid to him by the party was all that the party considered to be fair and sufficient for his upkeep and that the respondent's attempt to have an increase simply met with no response. Thus in desperation he resigned from the party, thinking that he could escape from "donating" all his parliamentary remuneration to the party. But he forgot that the party had his letter of resignation, which only needed to be dated and sent to the Dewan Ra'ayat to force his resignation or in the words of the appellant (DW1) to have him "removed from Parliament". This arrangement clearly shows that the respondent was treated as an employee of the party, whose business is to provide the party's representation in Parliament. The remuneration paid in respect of that representation did not belong to him but belonged to the party, which in turn would pay out of its own fund a monthly salary or allowance to the respondent as its member of Parliament.

We agree with the learned trial judge's ruling that the arrangement was illegal. Authorities cited by the respondent are too clear to admit of any contrary ruling.

Remuneration of members of Parliament is paid out of the Consolidated Fund under an Act of Parliament passed pursuant to Article 64 of the Federal Constitution. The present Act is Act 237 entitled "Members of Parliament (Remuneration) Act, 1980, and came into effect on July 1, 1980 replacing a number of previous Acts, including Parliament (Members' Remuneration) Act, 1960 under which the respondent's remuneration was paid. In providing remuneration for its members Parliament intends to provide them with a decent subsistence to enable them to carry out their duties free from any temptation of abusing their political powers and influence in order to acquire wealth. An undertaking whereby a member is deprived of the remuneration is clearly against public policy as it would be hard for him to function effectively as a member without financial worries. *Wells* v. *Foster*[1] and *Cooper* v. *Reilly*.[2]

(b) *Forfeiture of Seat in the Dewan Ra'ayat:*

The system of representative government is based upon freedom of choice. The electors must be free to choose a candidate to represent them in the legislature, whilst the candidate who is successfully returned must in turn be free to act in accordance with his independent judgment. Any arrangement depriving him of this independence is frowned upon by the law as violating public policy. Thus in *Amalgamated Society of Railway Servants* v. *Osborne*,[3] Fletcher Moulton and Farwell L.JJ. in the Court of Appeal and Lord Shaw of Dunfermline in the House of Lords expressed very strong objections to the legality of a rule of a trade union empowering the union to make a compulsory levy on its members for the purpose of securing representation in Parliament by members of Parliament paid and maintained by the union from the fund collected by the levy but responsible to the Labour Party whip. These three Law Lords held that the impugned rule in addition to being *ultra vires* the Trade Union Acts of 1871 and 1876 was also against public policy and therefore illegal.

Fletcher Moulton L.J. thought that the impugned rule was void because a member of Parliament accepts a trust towards the public and that any contract or agreement whether for valuable consideration or not which binds him to act against his independent judgment on matters of public issue is illegal. Farwell, L.J. on the other hand preferred to base his opinion of illegality from the point of view of the voters, including Mr. Osborne. Quoting *Blackstone*, Vol.1, p.178 and *Burke* (1815) Vol.III, p.19, he said that every voter must be free to choose who should be returned to Parliament.

Therefore any rule or contract which compels a voter to pay into a fund for the purpose of seeking the election of a certain candidate is illegal, because the voter may well be compelled to contribute to the election of someone whom he does not want to cast his vote for. Hence the impugned rule was held invalid.

In the House of Lords, Lord Shaw of Dunfermline based his entire judgment of the illegality of the impugned rule upon constitutional grounds. Like the views of the two Lord Justices in the Court of Appeal he proceeded with the concept of freedom as the basis of representative government. The electors who elect a Member of Parliament must be free to choose which of the candidates they prefer. Similarly, the candidate so chosen must also be free to act according to the best of his ability and his judgment and should not be subjected to the dictates of others. Therefore, any rule or contract with or without consideration which contravenes this freedom strikes at the very root of representative government and is therefore void and also against public policy.

It is based on these speeches that prompted the learned author of *Anson's* Law of Contract to include in the list of illegal contracts under the category of agreements tending to injure the public service "an agreement whereby a member of Parliament in consideration of a salary paid to him by a political association agreed to vote on every subject in accordance with the directions of the association." (24th Edn.p.340).

Returning to the respondent's undertaking on resignation, we see that in substance the arrangement was that he would forfeit his seat in Parliament if he acted contrary to the party's interest and that the appellant as Chairman of the party, having possession of the respondent's letter of prospective resignation, had a right to submit it to the Speaker. Clearly this undertaking is contrary to the trust or mandate which his constituents had given him as it reduced him to being a mere employee of the party, thus rendering the wishes of his constituents and his own judgment to be irrelevant.

Further, whilst we recognise that the existence of political parties is essential to the system of representative government and that political parties need finance and discipline in order to survive, we do not think that this sort of arrangement whereby a member is compelled to hand over all his parliamentary remuneration to his party and that his seat is forfeited at the instance of his party is in keeping with the system. As regards payment of remuneration to the party, it makes no difference whether it is politely described as "donation" because the payment being compulsory, such an arrangement virtually renders the member to be a mere subordinate or an employee of his party in which he had no say at all. Such arrangement certainly impairs his independent judgment as a legislator. Granted that the arrangement was part of a scheme to collect funds for the party and to strengthen its disciplinary authority over members and that the arrangement was considered vital to the existence and well-being of the party, this expediency alone cannot legalise what is illegal. No party can rely upon an external sanction to enforce discipline if the very disciplinary matter to be enforced, i.e. the payment of the remuneration to the party, and the form of sanction itself, i.e. the forfeiture of seat, are illegal.

Our system of Government expects that every member of the legislature, whether Parliament or a State Assembly, should conduct himself with honour and dignity worthy of his position as the nation's legislator and for this reason irrespective of his station in life and calling he is given the appellation of "The Honourable" to precede his name. It is because of this high regard and honour in which he is held that he is required to swear under Article 59 of the Federal Constitution and the equivalent Article of the State Constitution an Oath as Member of Parliament or State Assembly (as the case may be) and allegiance, instead of signing a contract as a civil servant does before taking part in the proceedings of the House. The Oath binds him in conscience which should guide him how to act not only with regard to his parliamentary or legislative duties but also in his relations with his party and members of the public. This honour and conscience expected of him should therefore obviate all the necessity of his party having to enter into the kind of agreement revealed in this appeal which certainly shows an embarrassingly low calibre and moral standard of our politicians in the early years of Independence. It is amazing that the respondent claimed in his evidence that he regarded the signing of the undertaking and the letter of resignation as a mere joke. But it is comforting to note now that with the passage of time and the spread of education many young people, both men and women, with better academic and professional qualifications driven by personal conviction and dedication rather than by opportunity to earn a living and be in the corridor of power are entering into the political arena. It is

expected that the standards of politics will increase more and more. We therefore hope that the Court will be spared the duty of having to decide similar cases in the future.

(c) *Effect of Article 51 of the Constitution upon the arrangement:*

It would appear also that the undertaking regarding the forfeiture of the seat is contrary to Article 51 of the Federal Constitution. This Article provides:

"A Member of either House of Parliament may resign his membership by writing under his hand addressed, if he is a member of the Senate, to the President of the Senate, and if a member of the House of Representatives, to the Speaker of that House."

Thus tenure of office of a member of Parliament is at his own pleasure except of course when he commits any acts disqualifying him from being a member. Apart from disqualification it is up to him whether he wishes to resign or not. There is no question of his seat being forfeited at the instance of any person or party on the ground that he has committed a breach of contract or arrangement with this person or party nor is there any question of him being removed from the House at such instance. However, this statement is as far as we can go under Article 51 of the Constitution for the time being in the context of this case. We cannot go any further because the Speaker is not a party to this suit nor did the respondent challenge his ruling in accepting his resignation. That being the case, we consider that the two Indian cases, *Thankamma* v. *Speaker of Travancore-Cochin Legislative Assembly*[4] and *Raghavanandam* v. *Chitrarasu*[5] cited to us in counsel's submission, though interesting, are irrelevant although the facts in these two cases appear to have some similarities to those in the present case. However, in both the Indian cases the Speaker was sued and his ruling on accepting the letter of resignation of a member was challenged whereas in the present appeal the respondent by his silence accepted the Speaker's ruling.

(2) *The second issue – Legal Effect of the Arrangement:*

As the arrangement between the respondent and his party in the matter of his remuneration and resignation is illegal and the illegality is not only with regard to its performance but in its very inception, such arrangement is therefore void *ab initio* and the parties are outside the pale of the law. The respondent being a party thereto cannot claim any remedy under this arrangement. He is not entitled to the refund of the balance of his remuneration kept by the party, nor could he claim any damages, special or general, in connection with his forced resignation: *ex turpi causa non oritur actio.* Even if he had no knowledge of the illegality, the arrangement being intrinsically and inevitably illegal, the law gives him no allowance for innocence so far as consequences are concerned. *Waugh* v. *Morris*[6] *J.M. Allan (Merchandising) Ltd.* v. *Cloke & Anor.*[7] On the other hand the appellant is entitled to rely upon illegality in his defence in order to meet the respondent's claim. The reason why the law allows the appellant to do so, as explained by Lord Mansfield in *Holman* v. *Johnson*[8] is due to the general principle of public policy contained in the maxim *ex dolo malo non oritur actio.* The court will not assist a person to pursue his claim if it arises *ex turpis* and when the defendant is equally at fault the court will apply the maxim *potior est conditio defendentis.* The learned trial judge therefore should have dismissed the respondent's suit *in toto.*

(3) *The third issue – whether despite illegality the respondent could succeed in his claim:*

The learned trial judge gave no reason why he allowed the respondent's claims for the refund of the remuneration and damages for the loss of it despite illegality other than what he shortly stated in his judgment as follows:

"The submission of the letter of resignation earlier signed by the Plaintiff to the Speaker, Dewan Ra'ayat, was therefore a wrongful act on the part of the Defendant and therefore the Plaintiff is entitled to damages."

With respect, we are unable to agree with this ruling. It is true that the respondent avoided the illegality by pleading (a) a quasi-contractual liability of money had and received in respect of his claim for the refund of the remuneration, and (b) the torts of malicious falsehood, misrepresentation and conspiracy as regards his claim for the special damages and unliquidated general damages. But he can successfully avoid the illegality only if he can show that the arrangement from the very beginning to the end was a fraud, of which he was innocent, *Shelley* v. *Paddock & Anor*[9]; Bristow J.[10] or that the facts constituting these causes of action are separable from those which constitute the illegality. It is not enough for him to merely separate the causes of action without also disregarding the facts constituting the illegality. In other words he does not rely upon the facts constituting illegality in order to press his cause of action. But how can he do it when the facts are common to both?

The arrangement is certainly not a fraud on the respondent. The party did not make any misrepresentation, fraudulent or otherwise, inducing him to sign the undertakings and the letter of resignation. It was simply a matter of free consent of both parties. Therefore we cannot see how the facts constituting this illegality could be separated from those which would constitute quasi-contractual and those alleged torts. It is clear therefore that the respondent could not repudiate his part in the illegality of an arrangement.

The party retained the respondent's remuneration because of the respondent's undertaking which he subsequently performed by requesting the Clerk of the Dewan Ra'ayat to remit it to Kwong Lee Bank which was in turn instructed by him to credit it, when received, into the party's account. What was done obviously was done because of this illegal arrangement and under no circumstances would the retention of his remuneration fall under the category of quasi-contractual liability as money had and received.

Similarly the dating and the sending of the letter of resignation were also done in pursuance of the legal undertaking and as such the illegality precludes him from claiming damages in respect of acts done in pursuance of it. The law is clear that he could not claim damages on the ground of breach of an illegal contract, *Miller* v. *Karlinski*(11) and *Alexander* v. *Rayson.*(12) His attempt to avoid the illegality by alleging malicious falsehood, fraudulent misrepresentation and conspiracy is therefore of no avail, because the acts constituting these torts were done in pursuance of the arrangement to which he had consented.

The tort of malicious falsehood sometimes known as injurious falsehood consists of a false statement made by the defendant to a third party concerning the plaintiff whereby he suffers loss through the action of this third party. (Salmond, 13th Edn. p.682). The only fact which could constitute the allegation of malicious falsehood is the appellant's act of inserting the date "August 3, 1971" in the letter of resignation and sending it to the Speaker. It is true that the Speaker of the Dewan Ra'ayat acted upon the letter by treating the respondent as having effectively resigned forthwith and so discontinued paying his remuneration and it is also true that the respondent did not intend to resign, but the dating of the letter of resignation as having been signed on August 3, 1971 and the sending of it to the Speaker were all made pursuant to the illegal arrangement to which the respondent was a party. Thus the maxim *volenti non fit injuria* applies in that no act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it. (*Salmond* p. 43).

The allegation that the appellant is guilty of fraudulent misrepresentation in our view is completely misconceived. Fraudulent misrepresentation by itself is not a wrong. It is only one of the four elements constituting the tort of fraud or deceit perpetrated on a plaintiff. Fraud consists of a fraudulent misrepresentation made by the defendant to the plaintiff whereby the plaintiff acting upon the supposition that the representation was true, suffered losses. (*Salmond* p. 65). In the present case no representation, fraudulent or otherwise, was ever made by the appellant to the respondent which resulted in the latter taking certain action to his loss. The signing of the undertaking by the respondent was not the result of any inducement or any misrepresentation made to him. He signed them willingly in return for the party's promise to nominate him as a candidate at the General Elections and to bear his election expenses.

As regards conspiracy, counsel for the respondent submitted that the Secretary-General of the party and the appellant conspired together to date the letter and to send it to the Speaker of the Dewan Ra'ayat. But their action was done because of the earlier sanction or authority given by the respondent by the respondent pursuant to the arrangement. In any case as the respondent was a party to the illegal arrangement, the maxim *volenti non fit injuria* also applies here in the same way as it does to the allegation of malicious or injurious falsehood. We therefore agree with the finding of the learned trial judge that the conspiracy was not proved.

Further, even if we treat the arrangement as being a friendly or gratuitous arrangement, not intended by both sides to be capable of creating any contractual right and obligation other than that which the general law of the land imposed or implied, it is clear that whatever was done under the arrangement would not entitle the respondent to bring this suit because of the application of the maxim *volenti non fit injuria. Bennett* v. *Tugwell*(13); *Birch* v. *Thomas.*(14)

Conclusion:

To us in whatever way we look at the appeal and the cross-appeal we are of the opinion that the respondent's claims must be dismissed. If the

arrangement was not illegal and therefore valid, it goes without saying that what were done by the party and the appellant with regard to the remuneration and resignation were fully authorised by the arrangement and no claim could therefore arise therefrom, unless it could be shown that the appellant was in breach of the arrangement. Such is not the case. If on the other hand the arrangement was illegal from its inception as both sides seem to think, and so do we, the respondent should not be entitled to the claim also, because the court will not lend its aid to an illegal transaction. Even the respondent's ignorance of the illegality cannot help him to succeed in his claim, because the law gives no allowance for ignorance when the arrangement is illegal from its inception. Further the appellant as a defendant is allowed by the law to rely upon the illegality in order to reject the respondent's claim. In any case no attempt was shown by him or his counsel that he had nothing to do with the arrangement or that he was an innocent party.

It is true that the respondent's case as can be seen from his pleadings and submissions by his counsel in the court below and before us is not founded upon this illegal arrangement but on a quasi-contractual liability and on torts of malicious falsehood or fraudulent misrepresentation and conspiracy; the illegality being contended as having no effect at all on any of his claims. In our view the respondent can succeed and treat the illegal arrangement as having no consequence upon his claims and rely upon those causes of action if – and only if – he can show that the arrangement was from the very beginning to the end a fraud of which he is completely innocent or that the facts constituting his causes of action, i.e. quasi-contractual liability and the alleged torts are not inseparable from those which constitute the illegality or that what were done were not done pursuant to the arrangement so as to exclude the operation of the maxim *volenti non fit injuria.* Only in any one of these cases can he succeed. We are of the view that he failed to show his case as falling under any of these circumstances. The arrangement is certainly not a fraud and neither are the facts constituting the alleged causes of action separable from those which constitute the illegality, nor were the acts of the appellant done otherwise than in pursuance of the arrangement so as to exclude the maxim *volenti non fit injuria.* Even if we hold that the arrangement was a friendly or gratuitous one, still the respondent is not entitled to recover any claim because of this maxim.

For the reasons given we therefore allow the appeal with costs here and in the Court below and dismiss the cross-appeal of the respondent likewise with costs. The deposit shall be refunded to the appellant.

Order accordingly.

Solicitors: *Yong & Wong; Thomas & Co.*

COMPTROLLER-GENERAL OF INLAND REVENUE v. LIM FOO YONG SDN. BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Salleh Abas F.J. and Abdoolcader J.) July 7, 8 & August 14, 1982]
[Kuala Lumpur – Federal Court Civil Appeal No. 73 of 1979]

Revenue Law – Income from business activities – Gains or profits from trade or business – Whether respondent was trading or carrying on a business – Question of fact – Finding by Special Commissioners – Income Tax Ordinance, 1947, s. 10(1)(a).

The respondent purchased five pieces of land at Jalan Treacher, Kuala Lumpur, and built a hotel on the site at the cost of $2,377,490.00, of which $2,000,000,00 was borrowed from the Employees Provident Fund Board to which the hotel and its lands were charged. The respondent also formed two subsidiary companies, the first the Hotel Merlin Ltd. in which the respondent held 90% interest in the form of 98,800 fully paid up shares of $10/- each, took a lease of the whole building and lands from the respondent to run and manage the hotel. The second subsidiary company, was Harlequin Ltd. in which the respondent held a 50% interest and this company took a sub-lease of a hotel restaurant from the Hotel Merlin Ltd.

Subsequently the respondent entered into a deal with the Employees Provident Fund Board wherely the hotel and its lands were sold to the Board for $5,000,000.00. It was also agreed that the respondent would have the right to repurchase the hotel building and land ten years later at the same price, of which $1,000.00 was paid as deposit. Further it was agreed that the Employees Provident Fund Board would lease the hotel buildings and lands to the respondent. The difference between the building cost ($2,377,490.00) and the sale price ($5,000,000.00) gave a surplus of $2,622,510.00 which was treated by the Comptroller-General as taxable.

Fourteen months later the respondent entered into an arrangement with a company called the Merlin Hotels Malaysia Ltd., (the Hotel Company) whereby the respondent sold to the Hotel Company its lease and its rights to repurchase the properties. The sale of the rights to repurchase was for a total consideration of $4,201,000.00 and this was satisfied by the issue of 4,201,000 shares of $1/- each in the Hotel Company. This consideration was treated by the Comptroller-General as subject to taxation.